APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-8395

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Plaintiffs-Appellees,

v.

RALPH OMAN, in his capacity as Register of Copyrights, and Director of the Copyright Office of the Library of Congress, and the COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS and UNITED STATES OF AMERICA,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

March 24, 1994

Before KRAVITCH and CARNES, Circuit Judges, and HAND *, Senior District Judge.

KRAVITCH, Circuit Judge:

This appeal calls upon the court to review the United States Copyright Office's ("Copyright Office") promulga-

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* Honorable William B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

tion of regulations which deny satellite broadcasters the right to subscribe to the compulsory licensing scheme set forth at 17 U.S.C. § 111. Based on this court's previous holding in *NBC v. Satellite Broadcast Networks*, 940 F.2d 1467 (11th Cir.1991) ("*SBN*"), the district court invalidated the Copyright Office regulations. The Copyright Office appeals.

Although the new regulations conflict with our interpretation of the term "cable system" in *SBN*, they are neither arbitrary, capricious, nor in conflict with the clear meaning of the statute. They are therefore valid exercises of the Copyright Office's statutory authority to interpret the provisions of the compulsory licensing scheme, and are binding on this circuit. Accordingly, we REVERSE the district court's invalidation of the regulations.

I.

Plaintiffs comprise the Satellite Broadcasting and Communications Association ("SBCA"), a trade group representing satellite carriers. Satellite carriers receive signals broadcast by television stations and then retransmit those signals by satellite to satellite dishes located in the homes of their subscribers.

This dispute centers on whether satellite carriers are "cable systems" for purposes of Copyright Act § 111, which defines a "cable system" as:

> a facility, *located in* any State, Territory, trust Territory, or Possession, that . . . receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals.

17 U.S.C. § 111(f) (emphasis added). If satellite carriers are "cable systems," then they are entitled to subscribe to the compulsory licensing system set forth in that

section.[1] This, in turn, would entitle satellite carriers to transmit copyrighted television broadcasts, so long as they pay royalties and abide by the procedures of the licensing scheme. By contrast, if satellite carriers are not "cable systems," then they are not permitted to subscribe to the licensing scheme and must find an alternate method of obtaining rights to their desired broadcasts.[2]

The Eleventh Circuit held in *SBN* that satellite carriers are "cable systems" covered by the compulsory licensing scheme. In *SBN*, NBC brought a copyright infringement action against SBN, a satellite carrier, alleging that SBN had rebroadcast NBC's signals without its permission. Interpreting the definition of "cable system" under § 111(f), this court held that satellite carriers implicitly were included in the compulsory licensing scheme, and that SBN

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[1] Title 17 U.S.C. § 111 provides for the compulsory licensing scheme, stating:

> [S]econdary transmissions to the public by *a cable system* of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing upon compliance with [procedural requirements and payment of mandatory royalties] where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.

17 U.S.C. § 111(c)(1) (emphasis added).

[2] In the Satellite Home Viewer Act of 1988, Congress created a compulsory licensing scheme for satellite carriers by adding § 119 to the Copyright Act. Pub.L. No. 100-667, §§ 201-02, 102 Stat. 3949-58 (1988). However, Section 119—which will expire on Dec. 31, 1994—offers little guidance in interpreting § 111 because the accompanying House Report stated:

> [N]othing in this Act is intended to reflect any view as to the proper interpretation of section 111 of this title prior to enactment of this Act, or after this Act ceases to be effective. . . . In particular, nothing in this Act is intended to reflect any view concerning whether . . . an entity that retransmits television broadcast signals by satellite to private home could qualify as a "cable system" under section 111(f).

H.R.Rep. No. 100-887(I). 100th Cong.2d Sess. at 27 (1988), U.S. Code Cong. & Admin.News 1988 at 5527, 5630.

thus had engaged in no infringing behavior. We rejected the suggestion that to be a "facility located in any state" pursuant to § 111(f), a "cable system" must be located *entirely* within a single state.[3] We further reasoned that there existed "no good reason" to prevent the often rural customers of satellite carriers from receiving the benefits afforded other cable viewers. *See* 940 F.2d at 1470.

Subsequent to oral argument in *SBN*, the Copyright Office issued a policy decision stating that satellite carriers are not "cable systems" under § 111(f). The Office reasoned that § 111(f) requires carriers to receive and transmit signals from within a single state, which is not the case with satellite technology. *See Id.* at 1469-70 n. 4 (citing Fed.Reg. 31,580 (1991)). We considered this policy decision in deciding *SBN*, but ultimately found it unpersuasive and, in any event, not retroactive. We emphasized, however, that we "of course express[ed] no opinion on the new rule's validity as applied prospectively." *Id.*

In 1992, after a notice and comment period, the Copyright Office affirmed its prior policy decision by promulgating a final rule which provided that carriers are not "cable systems" under § 111(f). 57 Fed.Reg. 3283, 3296 (January 29, 1992) (codified at 37 C.F.R. § 201.17(k)).[4] In its analysis, the Office roundly criticized our decision in

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[3] We based our broader reading of § 111(f) primarily on the section's restriction of "secondary transmissions" to transmissions by " 'cable system[s]' not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico." 940 F.2d at 1470. This definition suggested to us that a cable system might be located partly in Alaska and partly in another state, and thus need not be located within a single state.

[4] The Copyright Office added to 37 C.F.R. § 201.17 paragraph (k), which provides:

> Satellite carriers and MMDS not eligible. Satellite carriers, [and] satellite resale carriers . . . are not eligible for the cable compulsory license based upon an interpretation of the whole section 111 of title 17 of the United States Code.

SBN and offered several reasons directing an opposite conclusion. First, as the Copyright Office interpreted the statute, satellite carriers are not "located in any state, let alone the same state," a "critical requirement" under § 111(f). 57 Fed.Reg. at 3290. Moreover, the Office concluded that § 111(f) was "clearly directed at localized retransmission services," based on the section's provision that "two or more cable systems in *contiguous communities* . . . operating from *one headend*" constitute one "cable system" for purposes of determining royalties. *Id.* at 3292. The Office reasoned that the terms "contiguous communities" and "headend" [5]—applicable to local retransmissions—are anomalous in the context of geospherically orbiting satellite technology. *Id.* The Office further noted that § 111(f)'s definition of a "distant signal equivalent" [6] by reference to television stations "within whose local service area the cable system is located" is similarly inapplicable to satellite carriers. *Id.* Finally, the Office concluded that the legislative history is devoid of any indication that Congress considered satellite carriers when enacting the compulsory licensing scheme. *Id.* at 3291.

II.

The Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and applica-

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[5] A cable system's "headend" is its control center, from which a cable company receives signals and then transmits them, by coaxial cable, to the company's subscribers. *See generally Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 128 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S.Ct. 1232, 75 L.Ed.2d 467 (1983); *United States v. Norris*, 833 F.Supp. 1392, 1394 (N.D. Ind.1993).

[6] The "distant signal equivalent" is a figure used to calculate the percentage of gross receipts owed by a cable system to the copyright holders of programs broadcast. The figure takes into account the number of "distant," *i.e.* not receivable via antenna, independent, network and educational stations carried. *See e.g., Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608-09 (D.C.Cir.), *cert. denied*, 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed.2d 934 (1988).

tion of § 111. *See SBN*, 940 F.2d at 1469 n. 4; *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608-09 (D.C.Cir.), *cert. denied*, 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed2d 934 (1988); *see also DeSylva v. Ballentine*, 351 U.S. 570, 577-78, 76 S.Ct. 974, 978, 100 L.Ed. 1415 (1956) (recognizing that Copyright Office's interpretation of Copyright Act should ordinarily receive deference). As such, the Office's regulations must be upheld unless "they are arbitrary, capricious, or manifestly contrary" to the provisions of the Copyright Act. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Stated otherwise, if the Office has promulgated regulations which contradict the "clear meaning" or "plain language" of the statute, then those regulations must be struck down. *See, e.g., Lechmere, Inc. v. NLRB*, —— U.S. ——, ——, 112 S.Ct. 841, 847, 117 L.Ed.2d 79 (1992); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989); *Barrett v. Adams Fruit Co., Inc.*, 867 F.2d 1305 (11th Cir. 1989), *aff'd*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990).

Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782 (upholding Environment Protection Agency regulation which contradicted prior D.C.Circuit precedent).[7] Because the rule at issue in *Chevron* was

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[7] The regulatory scheme at issue in *Chevron* required that "nonattainment" states under the Clean Air Act establish a permit program regulating "new or modified major stationary sources" of air pollution. 467 U.S. at 840-42, 104 S.Ct. at 2780-81. Under an Environmental Protection Agency (EPA) rule, however, "nonattainment" states could adopt a plantwide definition of the term "stationary source," enabling plants with several pollution-emitting devices to circumvent certain EPA permit conditions. *Id.* The D.C. Circuit had invalidated the rule, based on its previous holding in

not "arbitrary, capricious, or manifestly contrary to the statute," it was valid, notwithstanding circuit precedent to the contrary. *Id.*

SBCA argues that the instant action is controlled not by *Chevron*, but rather by *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992). *Lechmere* overruled an NLRB order which contradicted established Supreme Court precedent by extending protection under NLRA § 8(a)(1) to union organizers who were not "employees" covered by the Act. *See* —— U.S. at ——-——, 112 S.Ct. at 845-46 (citing, *inter alia, NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956)). The *Lechmere* Court rejected the Board's application of NLRA protections to nonemployee organizers, and reiterated the rule that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination." —— U.S. at ——-——, 112 S.Ct. at 847-48 (quoting *Maislin Indus. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990)). Relying on *Lechmere*, SBCA contends that we are bound by our holding in *SBN*, absent *en banc* reconsideration of the issues.

Unlike the statutory scheme in *Lechmere*, which explicitly confined the protected class under NLRA § 8(a)(1) to "employees," § 111(f) is far from explicit as to the inclusion of satellite carriers. For this reason, we rested our decision in *SBN* not upon the statute's "clear meaning," but rather upon inferences drawn from the statutory scheme and upon our policy determination that satellite carriers should be included for the benefit of

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ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C.Cir.1978). *Natural Resources Defense Council, Inc. v. Gorusch*, 685 F.2d 718, 727 (D.C.Cir.1982); *see also ASARCO*, 578 F.2d at 325-27 (rejecting EPA's application of same rule in similar air-quality program).

their rural customers. We left open the possibility that we might later consider a contrary rule. Noting that the Copyright Office had issued a contrary 1991 policy decision, and anticipating the promulgation of a new rule, we "express[ed] no opinion on the new rule's validity as applied prospectively." 940 F.2d at 1470 n. 4.

Because we did not address the "clear meaning" of § 111(f) in *SBN*, this circuit is not precluded from revisiting our initial interpretation of the regulatory scheme in *SBN*. *See Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781 (Court of Appeals erred by "adopt[ing] a static judicial definition of [the statutory term at issue] when it had decided that Congress itself had not commanded that definition"). A contrary result illogically would wed this circuit to the *SBN* decision, while all other circuits and the Supreme Court would be bound under *Chevron* to defer to the Copyright Office rule. Moreover, it would create a rush to the courthouse among parties wishing to litigate a statute's meaning before an agency has exercised its broad "knowledge respecting the matters subjected to agency regulations." *Chevron*, 467 U.S. at 844-45, 104 S.Ct. at 2782-83 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)).[8]

III.

Having determined that *SBN* did not address the "clear meaning" of "cable system" under § 111(f), we likewise hold that the Copyright Office's construction of "cable

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[8] We find further support for our decision in *Schisler v. Sullivan*, 3 F.2d 563, 568 (2d Cir. 1993), which addressed a challenge to HHS regulations interpreting the "treating physician rule" used to evaluate disability claims. The Second Circuit upheld the new HHS regulations even though they conflicted with prior circuit precedent, because "[n]ew regulations at variance with prior judicial precedents are upheld unless 'they exceed[] the Secretary's authority [or] are arbitrary and capricious.'" 3 F.3d at 568 (quoting *Heckler v. Campbell*, 461 U.S. 458, 466, 103 S.Ct. 1952, 1956, 76 L.Ed.2d 66 (1983)).

system" to exclude satellite carriers is neither arbitrary, capricious, nor contrary to the statute's "clear meaning." As discussed above, the Copyright Office's exclusion of satellite carriers from the definition of "cable systems" is an interpretation based on reasonable inferences drawn from statutory scheme and policy. Although such an interpretation is not "the only one it permissibly could have adopted . . . or even the reading the court would have [and indeed has] reached . . . in a judicial proceeding," *see Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2781 n. 11, neither can it be said that the interpretation contradicts Congress's "clear meaning." Indeed, virtually nothing in the section's legislative history suggests that Congress even contemplated the entrance of satellite technology into the cable industry. *See* 57 Fed.Reg. at 3291.[9]

Accordingly, we REVERSE the decision of the district court, and REMAND for entry of judgment on behalf of the Copyright Office.

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[9] The subsequent addition of § 119 to the Copyright Act, *see supra* n. 2, creating a compulsory licensing scheme for satellite carriers, makes it further apparent that § 111 did not plainly address the inclusion of satellite carriers. If it had, § 119 would have been unnecessary.

APPENDIX B

DISTRICT COURT
N.D. GEORGIA

No. 1:92-cv-666-HTW

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

v.

OMAN

Decided January 27, 1993

Ward, J.

This matter is currently before this court on the following motions: (1) plaintiff's motion for summary judgment, (2) plaintiff's motion for summary judgment against defendant United States of America, (3) defendants' cross-motion for summary judgment, and (4) plaintiff's motion for a hearing on its motion for summary judgment. As a preliminary matter, this court DENIES plaintiff's motion for a hearing; in this court's view, the pleadings already submitted in this case provide a sufficient basis for the court's resolution of the parties' motions.

FACTS

Plaintiffs in this matter comprise the Satellite Broadcasting and Communications Association, (hereinafter "SBCA"), as well as several of its members who are so-called "satellite carriers." The satellite carrier plain-

tiffs retransmit broadcast programming via satellite for viewing by home satellite dish owners.

Defendants constitute the Register of Copyrights, the Copyright Office of the Library of Congress, and the United States, all of which have construed Section 111 of the Copyright Act to exclude satellite carriers from the statute's definition of "cable systems." In this lawsuit plaintiffs now challenge the validity of the defendants' interpretation of the statute.

Under Section 111, a "cable system" has an absolute right to retransmit broadcasts, subject to the filing of a statement of account and the payment of royalty fees, as long as it refrains from deleting or altering the broadcast's commercial advertising. *See* 17 U.S.C.A. §§ 111 (d)1, 2(A)-(D), & (3). The Act defines a "cable system" as follows:

> [A] facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables *or other communications channels* to subscribing members of the public who pay for such service.

17 U.S.C.A. § 111(f). (Emphasis supplied).

PROCEDURAL HISTORY

In 1987, the National Broadcasting Company, (hereinafter "NBC"), together with several of its affiliate stations, filed suit against the Satellite Broadcast Networks, (hereinafter "SBN"), one of the plaintiffs in this action. NBC and its affiliates alleged that SBN had infringed their copyrights by retransmitting network programming broadcast by local affiliates. In its defense, SBN stated that it had not infringed the plaintiff's copyrights, since

the rebroadcasts were licensed pursuant to the Section 111 compulsory license procedure.

The district court granted summary judgment in favor of NBC, holding that the defendant satellite carrier was not a cable system, as defined by Section 111(f). The court reasoned that because the defendant satellite carrier was not "located entirely within a single state," the statutory definition of a cable system could not encompass a carrier of this sort.

On appeal, the Eleventh Circuit reversed. *National Broadcasting Company v. Satellite Broadcast Networks*, 940 F.2d 1467 [20 USPQ2d 1071] (11th Cir. 1991). In its opinion, the court held that "SBN is a cable system as defined under § 111 whose secondary transmissions were permissible under FCC rules and regulations." *Satellite, supra*, 940 F.2d at 1471. The court also stated that it saw "no good reason why a satellite broadcasting company such as SBN should not be a cable system." *Satellite, supra*, 940 F.2d at 1470. The court finally rejected NBC's argument that " 'located in any State' means located entirely within a single state." *Id.* at 1470.

In 1992, the Copyright Office rejected the Eleventh Circuit's *Satellite* decision, and promulgated a new and final regulation providing that satellite carriers were not cable systems within the meaning of Section 111. The Copyright Office based this final interpretation on three grounds: (1) that the facilities of a satellite carrier are not located in any state, let alone in the same state, (2) that the Section 111 compulsory license applies only to localized retransmission services regulated by the FCC as cable systems, and (3) that retransmission via satellites were not retransmissions by "other communications channels," as required by the provisions of Section 111. *See* 57 Fed. Reg. 3284, 3290-91.

Plaintiffs then filed this lawsuit in order to challenge the validity of the Copyright Office's regulation.

DISCUSSION

A. *Plaintiff's Motions for Summary Judgment*:

This matter is first before this court on two separate motions for summary judgment submitted by plaintiffs. In plaintiffs' second motion, plaintiffs note that they have added the United States as an additional defendant in this matter, and then advise the court that they intend for the contentions submitted in their first motion to apply to this defendant as well.

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed. R. Civ. P. 56(c). To determine if the moving party meets its burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion. *Carlin Communication*, 802 F.2d at 1356; *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 656 (11th Cir. 1983).

The Supreme Court recently addressed the burdens of proof which each party must carry on a motion for summary judgment, and stated as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The nonmoving party

must identify specific facts which demonstrate that there is a genuine issue for trial; that party may not rest on the allegations or denials in its pleading. *Celotex*, 106 S.Ct. at 2553, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In order to survive defendant's motion, however, plaintiff needed only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. *Anderson*, 106 S.Ct. at 2514-15.

In this case, the regulation issued by the Copyright Office clearly conflicts with the decision issued by the Eleventh Circuit in *National Broadcasting Company v. Satellite Broadcast Networks,* 940 F.2d 1467 [20 USPQ2d 1071] (11th Cir. 1991). Plaintiffs contend that *Satellite* is now the law of this circuit, and that principles of *stare decisis* require this court to set aside the regulation of the Copyright Office. This court agrees. In this court's view, however, plaintiffs' brief shows evidence of some confusion concerning the appropriate roles of district and appellate court in the construction of judicial precedent; the court accordingly offers the following elaboration in an effort to clarify the question.

Defendants contend that the Supreme Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), governs this court's resolution of the conflict between the agency's regulation and the court's decision. Under *Chevron*, the court must first consider whether Congress has already addressed the issue in question; the court may determine whether the agency's interpretation is reasonable only if Congress has failed to confront the matter through any explicit statutory directive. Defendants thus contend that this court's only mandate is to assess the credibility of the regulation issued by the Copyright Office.

Plaintiffs, in contrast, urge that this court adopt the analysis recently enunciated by the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992). In

Lechmere, the Supreme Court emphasized that it would not implement the two-pronged *Chevron* test without first determining whether the agency's construction of the statute is "consistent with our past interpretation" of the provision. *Lechmere*, 112 S.Ct. at 847. As the court stated in *Lechmere*, "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Lechmere*, 112 S.Ct. at 847-48. Plaintiffs accordingly contend that *Lechmere* compels this court to apply the precedent already established by the Eleventh Circuit—that a satellite carrier, in short, is a cable system within the meaning of Section 111.

In this court's view, plaintiffs have somewhat misconstrued the nature of the Court's directive in *Lechmere*; in that case, the Supreme Court intended its language to serve only as an illustration of its *own* procedure, as a final and ultimate appellate authority, when interpreting a statute in the face of pre-existing judicial precedent. District courts, in contrast, must follow, as a matter of course, the precedents established by their appellate courts.

As one circuit court has stated, "[t]he decision of an appellate court is binding (not just persuasive) on those lower in the hierarchy even if not binding on the parties under principles of preclusion—that is, the parties are free to relitigate but unlikely to get anywhere." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532 (7th Cir. 1988). As the Seventh Circuit further elaborated in an earlier case, district courts are not at liberty to reconsider issues already decided by an appellate court:

> Whether a decision is authoritative depends on a variety of factors, of which the most important is the relationship between the court that decided it and the court to which it is cited later as precedent. ***The simplest relationship is hierarchical; the decisions of a superior court in a unitary system binds the inferior courts.***

Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987).

In this case, the Eleventh Circuit has already determined that a satellite carrier, in short, is a cable system within the meaning of section 111. The Eleventh Circuit therefore has made its decision, and must accordingly "give considerable weight to [that] decision[] unless and until [it has] been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling." *Colby*, 811 F.2d at 1123. By the same token, the Eleventh Circuit "is not absolutely bound by [that decision], and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision." *Colby*, 811 F.2d at 1123.

This court, in short, may not, and will not, reconsider a question already resolved by a previous opinion issued by its own appellate court. The Eleventh Circuit issued the opinion, and defendants, if they wish, may argue on appeal that that court should reexamine the question and overrule its decision. *That* court, unlike this one, will have the authority, at least, if not the inclination, to pursue the course now urged by defendants today.

CONCLUSION

This court, therefore, after due consideration, GRANTS both plaintiffs' initial motion for summary judgment, and plaintiffs' motion for summary judgment against defendant United States of America. The court DENIES defendants' cross-motion for summary judgment, and likewise DENIES plaintiff's motion for a hearing.[1]

SO ORDERED.

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[1] As a courtesy to the clerk of court, this court advises the clerk that this Order terminates entries nos. 11, 17, 22 and 25 on the docket sheet.

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-8597

NATIONAL BROADCASTING COMPANY, INC.,
Plaintiff-Appellee,

v.

SATELLITE BROADCAST NETWORKS, INC.,
Defendant-Appellant.

NBC TELEVISION AFFILIATES,
Plaintiff-Appellee,

v.

SATELLITE BROADCAST NETWORKS, INC.,
Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia

Sept. 4, 1991

Before EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ESCHBACH, Senior Circuit Judge:

Is Satellite Broadcast Networks, Inc. ("SBN") a "cable system" under 17 U.S.C. § 111? If it is, then it was free to rebroadcast the television signal of a National Broadcasting Company (NBC) affiliate. If not, then SBN is liable to NBC for copyright infringement. We conclude that SBN is a cable system and so reverse the District Court's summary judgment in NBC's favor.

The facts are undisputed. SBN has facilities in Georgia, Illinois and New Jersey that receive the broadcast signals from local television stations. SBN then scrambles the signals and rebroadcasts them across the country by satellite. Any owner of a home satellite dish can receive the signal and, for a fee, receive an unscrambling box from SBN. One of the local signals that SBN has retransmitted is that of WXIA, the Atlanta affiliate of NBC.

NBC filed this action in 1987 claiming that SBN has infringed NBC's exclusive rights in copyrighted work [1] by rebroadcasting WXIA's signal without NBC's permission. NBC's suit is based on 17 U.S.C. § 501(b), which entitles "[t]he legal or beneficial owner of an exclusive right under a copyright . . . to institute an action for any infringement of that particular right. . . ." SBN responds that it committed no infringement. It argues that NBC and its affiliates had no choice but to grant SBN the right to rebroadcast their transmissions because of a "compulsory license" provided in 17 U.S.C. § 111, which states:

> [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing upon compliance with [procedural require-

[1] NBC owns the copyright to a very few television programs, such as *NBC Nightly News* and *Today*. For the majority of its programs, NBC possesses the exclusive right to broadcast. Affidavit of John Damiano ¶¶ 8-9.

> ments and payment of mandatory royalties] where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.

17 U.S.C. § 111(c)(1). NBC must grant SBN the license as long as SBN meets the requirements of § 111. If SBN qualifies for the license, it is not an infringer because it has violated no exclusive rights.

No one disputes that SBN's satellite broadcast was a "secondary transmission"; that WXIA is a broadcast station; and that SBN complied with all the procedural and royalty requirements. The question is whether SBN is a "cable system." The District Court concluded on summary judgment that SBN cannot be a "cable system," and so has no rebroadcast rights under § 111, because its facilities are not located entirely within a single state. Our review of a district court's grant of summary judgment is plenary. *Kendrick v. Jefferson County Bd. of Educ.*, 932 F.2d 910, 912 (11th Cir.1991).

The District Court's view[2] was based on § 111(f), which defines "cable system" as:

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[2] Outside this litigation, no court has addressed the question whether a satellite rebroadcast facility like SBN can be a cable system under § 111. And it is highly likely that we will be one of the last courts to address the issue. Through the Satellite Home Viewer Act of 1988, Congress has provided a new compulsory license for satellite carriers like SBN. *See* 17 U.S.C.A. § 119 (West Supp.1991). Section 119(e) provides that § 111 is not to be construed as providing any authority for secondary transmissions by satellite carriers while § 119 remains effective. Section 119 became effective on January 1, 1989 and ceases to be effective on December 31, 1994. *See* Pub.L. 100-667 §§ 206-07, 102 Stat. 3960 (1988). The Congress was very careful to note that the Satellite Home Viewer Act is not to be interpreted as impacting SBN's alleged status as a cable system in the current lawsuit. *See* H.R. No. 100-887(I), 100th Cong., 2d Sess. 14, *reprinted in* 1988 U.S.Code Cong. & Admin.News 5611, 5617 and 5630.

> a facility *located in* any State, Territory, Trust Territory, or Possession, that . . . receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals. . . .

17 U.S.C. § 111(f) (emphasis added).[3] The District Court concluded that to be a "facility located in any State," the facility must be located entirely within a single state.[4] In drawing this construction, the Court was at-

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[3] Section 111(f) goes on to require that the secondary transmission be made through "wires, cables, or other communications channels." A question arises whether a transmission via satellite is one through "other communications channels." We think so. The legislative history shows that in considering the Copyrights Act, Congress understood that the development of satellites promised a new channel for communicating in the future. *See* H.R.Rep. No. 94-1476, 94th Cong., 2d Sess. 47, *reprinted in* 1976 U.S.Code Cong. & Admin.News 5659, 5660. Moreover, in interpreting another provision of § 111, both the Second and the Eighth Circuits have concluded that transmission by "wires, cables or other communications channels" includes satellite broadcasts. *See Hubbard Broadcasting v. Southern Satellite*, 777 F.2d 393, 401-02 (8th Cir.1985), *cert. den.*, 479 U.S. 1005, 107 S.Ct. 643, 93 L.Ed.2d 699 (1986); *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 131 (2d Cir.1982), *cert. den.*, 459 U.S. 1226, 103 S.Ct. 1232, 75 L.Ed.2d 467 (1983).

[4] Subsequent to oral argument in this case, the Copyright Office issued a policy decision that satellite carriers like SBN are not "cable systems" under § 111. Cable Compulsory License; Definition of Cable Systems, Fed.Reg. 31,580 (1991). Specifically, the Copyright Office has ruled that a facility must both receive and transmit signals from within the same state in order to qualify for compulsory licensure. *Id.* at 31,590-91. The Copyright Office's policy decision is one of general applicability (*see id.* at 31,588) and fits within the Agency's rulemaking authority. *See* 5 U.S.C. § 551(4); *cf. Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 607-10 (D.C.Cir.1988) (recognizing the authority of the Copyright Office to interpret § 111), *cert. den.*, 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed.2d 934 (1988). If this recent promulgation applied retroactively to this case, it might be entitled to deferential review under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778,

tempting to limit cable system status to traditional cable companies that serve only local communities. But nothing in the words Congress chose counsel that only local cable

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2781-83, 81 L.Ed.2d 694 (1984) and *Rust v. Sullivan*, —— U.S. ——, ——-——, 111 S.Ct. 1759, 1766-72, 114 L.Ed.2d 233 (1991). But the language of the Notice does not require that it apply retroactively. And even if it did, we are unconvinced that the Copyright Office would have the authority to issue a retroactive rule, because nothing in either the Administrative Procedure Act or the Copyrights Act explicitly so empowers the Agency. *See* 5 U.S.C. § 551(4) (" 'rule' means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy. . . .") (emphasis added); 17 U.S.C. §§ 701-10; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.") (citations omitted); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990); *Wright v. Director of Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1571-74 and n. 11 (11th Cir.1990); *Chaves County Home Health Serv., Inc. v. Sullivan*, 931 F.2d 914, 923 (D.C.Cir.1991); *General Motors Corp. v. National Hwy. Traffic Safety Admin.*, 898 F.2d 165, 169 (D.Cir.1990); *General Am. Transp. Corp. v. Interstate Commerce Comm'n*, 872 F.2d 1048, 1060-61 (D.C.Cir.1989), *on rehearing*, 883 F.2d 1029, 1030-31 and n. 2 (D.C.Cir.1989) (Silberman, J., concurring), *cert. den.*, —— U.S. ——, 110 S.Ct. 1112, 107 L.Ed.2d 1019 (1990); *Chemical Waste Mgmt., Inc. v. United States Environmental Protection Agency*, 869 F.2d 1526, 1535-37 (D.C.Cir.1989); *cf. Myers v. Sullivan*, 916 F.2d 659, 675-78 (11th Cir.1990) (discussing retroactive application of judicial decisions in an agency proceeding); *Alacare Home Health Serv., Inc. v. Sullivan*, 891 F.2d 850, 854-55 (11th Cir.1990) (retroactivity in an agency adjudicatory proceeding); *Kaiser*, 110 S.Ct. at 1585-88 (Scalia, J., concurring) (discussing the precedent and policy reasons supporting the presumption of nonretroactivity). In any event, we have considered the views of the Copyright Office on the language and legislative history of § 111, but we find those views unpersuasive. We of course express no opinion on the new rule's validity as applied prospectively.

companies be included,[5] and if Congress had intended to benefit only community-based systems, it could have defined "cable system" more narrowly. *Cf.* 47 U.S.C. § 522(6) (defining "cable system" in the Cable Communications Policy Act to mean a facility that provides video programming to multiple subscribers "within a community"). We are thus unpersuaded that "located in any State" means located entirely within a single state. Indeed, if this narrow reading were to prevail, many of the concededly traditional local systems serving communities that cross a state border[6] would lose their cable system status.

Reading "located in any State" so narrowly also ignores the definition that immediately precedes that of "cable system"—the definition of "secondary transmission." A secondary transmission:

> "is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission *if by a 'cable system' not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico . . .*"

§ 111(f) (emphasis added). The highlighted portion is a rather cumbersome way of describing a cable system located entirely within Alaska. But a nonsimultaneous broadcast is *not* a secondary transmission if made by a

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[5] The legislative history supports our conclusion that Congress intended to paint with a broad brush: "Cable television systems are commercial subscription services that pick up broadcasts of programming originated by others and retransmit them to paying subscribers." 1976 U.S.Code Cong. & Admin.News at 5702. SBN clearly fits this definition.

[6] TCI of Maryland, Inc. serves subscribers in West Virginia, Pennsylvania and Maryland; Cox Cable Quint-Cities serves subscribers in Illinois and Iowa; and Comcast Cablevision of Paducah serves subscribers in Kentucky and Illinois. Affidavit of G. Todd Hardy ¶ 3.

cable system located *partly in Alaska and partly in some other state.* If a cable system must be located entirely within a single state, it would have been sufficient for Congress to say "if by a 'cable system' located in Alaska." This suggests that Congress understood it would be possible for a cable system to exist "in part" within Alaska and "in part" elsewhere. This suggestion is consistent with our analysis, but conflicts with the District Court's view, that a cable system can never exist in part in one state and in part in another.

Finally there is no good reason why a satellite broadcasting company such as SBN should not be a cable system.[7] Without dispute, SBN could have broadcasted its signal to other cable systems located throughout the nation with each of these cable systems passing the signal along to the public. *See EMI*, 691 F.2d at 132-35 and n. 17 (EMI transmitted its signal to 600 cable systems); *Hubbard Broadcasting*, 777 F.2d at 401-05. SBN has simply eliminated the middleman. *See EMI*, 691 F.2d at 131, 133. Moreover, to conclude that SBN cannot be a cable system because of its geographic reach would be to prevent those in sparsely populated areas from receiving the quality television reception technology can provide. Common practice in the traditional community-based cable television industry assumes it is uneconomical

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[7] NBC laments that because of SBN's broad geographic reach, SBN threatens the major television networks. For instance, an SBN subscriber in Arizona could view the WXIA broadcasts of *L.A. Law* or *Cheers* hours before the NBC affiliate in Arizona broadcasted these episodes. NBC may have a legitimate gripe, but protecting the network system is not a concern of § 111. "[T]he retransmission of network programming, including network programming in 'distant' markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly." 1976 U.S.Code Cong. & Admin.News at 5704; *see also Cablevision Sys. Dev.*, 836 F.2d at 603; *Hubbard*, 777 F.2d at 396. NBC's concerns are more about communications policy than about copyright infringement and are more appropriately directed to the FCC.

to wire homes in areas with less than 40 households per square mile. Affidavit of Mary (Kazie) Catherine Metzger ¶ 10. The majority of SBN's customers live in these sparsely populated areas not served by traditional cable television. *Id.* at ¶ 14. Indeed, many live outside the reach of the signals of one or all of the networks' programming. *Id.* at ¶ 15. If these people are to receive cable at all, it will have to be satellite-based cable. In short, there is no good reason to read "cable system" narrowly to deny SBN its license, and to do so will do an injustice to those who live in rural areas. SBN is a cable system.

A minor issue that remains is that § 111(c)(1) gives SBN rebroadcast rights only if that rebroadcast was "permissible under the rules, regulations, or authorizations" of the FCC. The short answer is that the rebroadcast was permissible because no rule or regulation forbade it.

NBC has argued that before SBN's transmissions could become "permissible," the FCC had to affirmatively approve them. But to require express approval of the FCC would be to reach a result from the FCC's inaction that the FCC unequivocally does not intend. The FCC has expressed sympathy for NBC's concerns that direct-to-home satellite distribution threatens the network-affiliate relationship (*see supra* note 7), but the FCC has explicitly stated it would not address these concerns until after the courts have resolved the copyright infringement issue. *See* Inquiry into the Scrambling of Satellite Television Signals, First Report, 2 FCC Rcd. 1669 ¶¶ 200-01 (1987). More to the point, the FCC has said "The question of whether the cable compulsory license applies to [home satellite dish] sales is unresolved. *We do not purport to resolve it.*" Inquiry into the Scrambling of Satellite Television Signals, Second Report, FCC 88-67, Docket No. 86-336 n. 27 (released March 11, 1988) (emphasis added). We will not read a result from the FCC's failure to act that the FCC neither intends nor

foresees. The secondary transmissions were "permissible" under existing FCC rules, regulations and authorizations.

SBN is a cable system as defined under § 111 whose secondary transmissions were permissible under FCC rules and regulations. Therefore, SBN's rebroadcast of WXIA's signal infringed no copyright. The judgment of the District Court is REVERSED. The award of attorney's fees in favor of NBC is also REVERSED.